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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 23 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Marie Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a chemist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, numerous letters, and other exhibits. Counsel requests oral argument based on "the precedential significance of this case and the legal issues presented." The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, U.S. Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 30, 2006. At the time of filing, the petitioner was in the United States on an F-1 nonimmigrant student visa, studying English at Bell Language School, Brooklyn, New York.

The petitioner holds a master's degree in chemical engineering from the State Engineering University of Armenia. In a statement accompanying the initial submission, the petitioner indicated that he "was pursuing a Ph.D. in Chemical Kinetics, concerning the realization of solid-phase materials and transformation under the effect of gas-phase chain reactions," but "financial difficulties" forced him to leave the program. He then "accepted a Quality Control Operator position from Coca-Cola Bottlers in Armenia," with a subsequent promotion to the "position of Quality Assurance Supervisor." The petitioner stated that his "unique and diverse experiences" have prepared him "to be an effective researcher with a solid background."

Much of the petitioner's initial submission consisted of copies of diplomas and certificates that the petitioner earned in his academic and professional life. Witness letters also accompanied the petition. [redacted], Senior Scientist at Transave Inc., Monmouth Junction, New Jersey, stated:

> Transave Inc. [is a] leader in developing new treatments for life threatening lung diseases. I am considered an expert in the field of particulate and lipid-based pharmaceutical delivery systems.
>
> I have known [the petitioner] since he came to US in April 2005 to study language arts. When I first met him I was impressed with his self motivation and exceptional expertise in all aspect[s] of Analytical chemistry and Quality Assurance. We had a very useful discussion on using HPLC and other analytical methods in detecting minimal quantities of lipids in liquid samples. In fact, he made excellent suggestions on the topic, which helped me in my work in liposomal pharmaceutical formulations. . . .
>
> In his last employment at the Armenia Division of Coca-Cola Corporation he . . . became Quality Assurance Supervisor and was a key contributor to the success of Coca-Cola in Armenia.

[redacted] who directed the petitioner's master's research at the State Engineering University of Armenia, stated that the petitioner's "background uniquely enables him to combine experimental and theoretical approaches in his research studies. He has remarkably wide research interests that have led him to the studies of gas-phase chain reactions."

[redacted] of the Institute of Chemical Physics at the National Academy of Sciences of the Republic of Armenia (NAS RA) stated:

> [The petitioner] has been working with us . . . as a scientific researcher almost three years. At the same time he was pursuing a PHD in Institute of Chemical Physics NAS

> RA under my supervision on the special problems of chemical kinetics, concerning [the] realization of solid-phase materials and compounds transformation under effect of gas-phase chain reactions. He started with very little experience in [the] work we have been doing. He has learned fast and [is] quite familiar with the techniques for doing experiments in "Kinetic peculiarities of heterogeneous processes of chemical transformation of Cu and Pb salts under effect of chain reactions." . . . He is a very careful worker who . . . is always willing to stay late or [on] the weekend.
>
> now Chief Financial Officer of Multon CJSC, Moscow, Russia, stated:
>
> I [have known the petitioner] for more th[a]n 5 years, since I was a CFO and Acting General Manager in Coca-Cola Bottlers Armenia and he was a very successful Quality Assurance Supervisor. He was responsible for planning, coordinating and managing the plant's quality control/assurance activities and quality systems' implementation.
>
> Due to his really extraordinary technical and core managing skills he was always providing continuous improvement in personnel objectives and targets. During his work Coca-Cola Bottlers Armenia finally achieved a very high product quality ranking in The Coca Cola System and at the same time the plant received a governmental award for high quality performance.

A translated newspaper article, which does not mention the petitioner, corroborates the claim about the award. Other Coca-Cola officials in Armenia and Russia praised the organizational and managerial abilities that the petitioner showed while working for that company, but they did not discuss his background in chemistry or indicate how, if at all, that background affected his work for the bottling company.

The petitioner submitted translated copies of articles and abstracts produced by his academic research. These materials demonstrate that the petitioner was a productive researcher while he was a student, but by themselves they cannot establish the value of the petitioner's work relative to the published work of other researchers in chemistry.

On April 30, 2007, the director issued a request for evidence, instructing the petitioner to submit further evidence that he qualifies for the waiver and for the underlying immigrant classification. In response, the petitioner stated:

> I accepted an offer from Celsis Laboratory Group, department of Analytical Chemistry in November 2006 and started an assignment on December 5th, 2006.
>
> . . . Celsis [L]aboratory Group provides laboratory services to pharmaceutical and biopharmaceutical companies, including full spectrum of analytical testing . . . and we do Method Validation and modification (R&D). . . . My ultimate goal is a Scientist

position in Chemical/physical research. I will bring to the research program in this field my enthusiasm, integrity, deep scientific knowledge and rich multicultural experience.

[redacted], Vice President of Atrium Scientific, New York, New York, offered more information about the petitioner's position:

> We are a professional staffing firm with strong focus in scientific placement. [The petitioner] started a long-term temporary assignment with our staffing firm on December 5th, 2006 as a Chemist working for one of our clients. [The petitioner] performs chemical, physical tests/analysis of pharmaceutical products, drugs, and control[led] substances.

[redacted] Wet Chemistry Supervisor at Celsis Laboratory Group, Edison, New Jersey, stated:

> [The petitioner's] work at our laboratory has primarily been focused on Chemical, Physical tests and analysis. . . . I can personally attest to the strides that he has made while at our laboratory. Though he had had some research experience prior to joining the Laboratory, his talents in that area have grown by leaps and bounds. Indeed, he is blossoming into a creative, productive chemical analyst.

now of Sanofi Aventis, Bridgewater, New Jersey (a Celsis client company), praised the petitioner in very general terms, for instance stating that the petitioner's "thinking process revealed a logical, precise, detail oriented and systematic approach to problems. He has a great deal of scientific knowledge, especially in the area of Analytical Chemistry."

The director denied the petition on September 15, 2007. In the decision, the director found that the petitioner's field of chemistry possesses substantial intrinsic merit, but that the petitioner had failed to establish that his work is national in scope, or that it would serve the national interest to waive the job offer requirement for the petitioner to continue that work. The director found that the petitioner had not had a particularly significant impact in the field of chemistry.

On appeal, counsel contends: "the reasoning in ***New York State Department of Transportation*** as it relates to the relationship between national interest waiver and alien labor certification runs contrary to the commonsense reading of the statute in context." *Matter of New York State Dept. of Transportation* is a published precedent decision, and is therefore binding on all USCIS officers pursuant to 8 C.F.R. § 103.3(c). Moreover, that precedent decision has survived federal court challenges without being overturned. *See, e.g., Talwar v. U.S. I.N.S.*, 2001 WL 767018 (S.D.N.Y.). The AAO stands by the proposition that the statutory construction clearly favors the job offer requirement (with labor certification) as the presumptive or default requirement, and that an exemption from that requirement in the national interest is an additional benefit for which the petitioner bears the burden of proving a given alien's eligibility. The AAO categorically rejects counsel's contention that the director's decision must be overturned because it relies on fatally flawed case law.

Counsel argues:

> The evidence submitted demonstrates that this particular individual chemist occupies a pivotal role in a critical industry. One brilliant scientist in an indispensable post really does matter. . . .
>
> [T]he national interest waiver process allows approval of a visa petition simply because a particular beneficiary is the best in his field, not just because he is qualified. We contend that this alien is actually "the best," and it is in our national interest to facilitate his smooth transition to permanent residence.

(Counsel's emphasis.) The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). To determine whether the petitioner is indeed "the best in his field," we must consider the evidence of record.

The petitioner's initial submission did little more than establish that the petitioner is professionally qualified to work in the field of chemistry. There was no evidence that the petitioner had ever been employed in the field of chemistry; rather, he was a chemistry student, and then worked in quality control for a soft-drink bottler, and finally traveled to the United States for studies unrelated to chemistry.

The petitioner's response to the subsequent request for evidence focused largely on his job at Celsis, which he did not hold until six months after he filed the petition at the end of May 2006. In the best of circumstances, this employment could not newly establish eligibility if the petitioner had not already been eligible prior to that employment. The beneficiary of an immigrant visa petition must be eligible at the time of filing; subsequent developments cannot cause an alien to become eligible. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The petitioner's employment at Celsis does help to establish the petitioner's intent to work in the field of chemistry, but the documents submitted relating to that employment do not establish that the petitioner was among the best in his field as counsel claims. We note [redacted]'s comment that the petitioner's "talents . . . have grown by leaps and bounds. Indeed, he is blossoming into a creative, productive chemical analyst." This does not describe a top chemist; it describes a chemist who, well after the petition's filing date, is still learning his craft and improving his skills to the point where he is now "productive."

We find, based on the above discussion, that the record of proceeding, at the time of the director's decision, portrayed the petitioner as a competent chemist, but not one whose experience and impact on the field distinguished him from others in a manner that would justify the special benefit of a national interest waiver.

A number of witness letters accompany the appeal. Many of these are copies of previously submitted letters. Here, we will focus on the newly submitted letters. [redacted] Human Resources and Payroll Specialist at Celsis Laboratory Group, describes the petitioner's most recent work as a "chemist/analyst" at that company:

> One of his main tasks [at] Celsis Laboratory Group is detection and quantitation of impurities in the chemical synthesis products after purification. . . . Major Pharmaceutical companies rel[y] on our analytic services in their process of drug formulations.
>
> [The petitioner] is an extremely valuable asset of our company. His work involves testing raw materials and final products (medicines and research products) . . . for different pharmaceutical companies such as Sanofi Aventis, Mutual Pharmaceuticals, Transave, and others. He also is involved in research and development, tests design, validation testing and special projects. . . . The accuracy of test data, for which Celsis Laboratory Group is famous could be attributed to a large extent to the [petitioner's] excellent work.

[redacted], Quality Control Supervisor at Transave Inc., states: "Celsis is the world leading provider of analytical services to the pharmaceutical, biopharmaceutical companies in USA and in Europe. . . . Nine of [the] ten top pharmaceutical companies in the USA are . . . Celsis customers."

As we have already noted, the petitioner's work at Celsis did not begin until well after the petition's filing date, and therefore under no circumstances could we conclude that the petitioner's work at Celsis qualifies him for the waiver he requested in May 2006, either by virtue of national scope or because of the strength of the petitioner's individual contributions. Even then, the letter quoted above does not indicate how the petitioner's work stands apart from that of any properly qualified analytical chemist, whose basic job duties include ensuring the purity and quality of pharmaceutical or other products.

[redacted] of Kerama Marazzi, Orel, Russia, who knew the petitioner during his unfinished doctoral studies, states:

> [The petitioner] is a chemist of the highest order with an extremely strong background. During his doctoral study he had acquired unique expertise in [a] very difficult area of research pertaining to gas-phase chain reactions and hetero-phase transmissions. . . . [The petitioner's] significant findings are important for the understanding of how radicals of hydrocarbons oxygen or chlorine mixtures formed and how they can effectively interact with the oxides, sulfides and other salts. . . . These fundamental studies received a lot of attention form [*sic*] the research community at an international level. [The petitioner's] work is [a] significant contribution to the understanding of the radical-chain mechanism of gas phase reactions, the kinetics and modeling of complicated hetero-phase systems.

[redacted] calls the petitioner a "first-rate chemist with an unusually strong background" whose "fundamental studies have received a lot of attention form [*sic*] the research community at an international level." [redacted], who describes himself as a "resident in Internal Medicine at Long Island Jewish Medical Center," does not explain how he became familiar with the petitioner's work, nor does he claim any particular credentials in chemistry. The AAO notes that [redacted]'s letter contains a passage that is nearly identical (including the mistaken use of "form" in place of "from") to a passage in [redacted]'s letter.

The record contains no persuasive evidence to support the new claim, never advanced before the appeal, that the petitioner's doctoral research gained international recognition. There ought to exist some kind of objective evidence (such as heavy citation of the petitioner's published work) to support such a claim; otherwise, the witnesses would have no reliable basis to claim knowledge of such recognition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). The record does not persuasively support the petitioner's new claim that his student work "received a lot of attention [from] the research community at an international level," and the circumstances of the new appearance of that claim (almost identically worded in supposedly independent letters) raise questions of credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.